

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 15, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP1777

Cir. Ct. No. 2013PR105

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE ESTATE OF EARL W. JACOBSON:

ROBERT JACOBSON, LISA DIDIER AND JOHN JACOBSON,

APPELLANTS,

V.

JO ANNE N. JACOBSON,

RESPONDENT.

APPEAL from an order of the circuit court for Ozaukee County:
PAUL V. MALLOY, Judge. *Affirmed.*

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Robert Jacobson, Lisa Didier, and John Jacobson (collectively “the Jacobson children”) appeal from a circuit court order finding that a lake home owned by their father Earl W. Jacobson (“the Decedent”) and his

wife Jo Anne N. Jacobson (“Jo Anne”) prior to the Decedent’s death is survivorship marital property, thereby excluding it from the Decedent’s estate. The Jacobson children challenge the circuit court’s substantive finding as well as two of its evidentiary rulings. We reject their arguments and affirm.

¶2 This case involves an estate administration of the Decedent, who died intestate on April 20, 2010. The Jacobson children are the Decedent’s children from his first marriage. Jo Anne is the Decedent’s second wife.

¶3 Jo Anne and the Decedent were married in 1994. In 2001, they acquired a lake home in the Town of Beecher in northern Wisconsin. The deed as signed by the seller identified the grantee as “Earl W. Jacobson and Jo Anne N. Jacobson, husband and wife as marital property.”

¶4 As part of the administration of the Decedent’s estate, the personal representative included in the inventory the Decedent’s one-half marital property interest in the lake home. Jo Anne objected to the inclusion, claiming that the lake home should be classified as survivorship marital property. The circuit court set the objection for an evidentiary hearing.

¶5 Prior to the evidentiary hearing, the Jacobson children sought to exclude any evidence with respect to the titling of the lake home other than the deed. Jo Anne argued that extrinsic evidence was permitted in seeking reformation, as the deed was not drafted in conformity with the title commitment referenced in the offer to purchase, which provided “husband and wife as survivorship marital property.” The circuit court found ambiguity in the transaction documents and recognized its ability, as a court of equity, to order reformation. Accordingly, it denied the Jacobson children’s motion to exclude extrinsic evidence.

¶6 At the evidentiary hearing, the Jacobson children objected to Jo Anne's competency to testify under WIS. STAT. § 885.16 (2013-14),¹ also known as the dead man's statute. The circuit court allowed Jo Anne to testify to her conduct, perspective, and thoughts, but prohibited any testimony regarding the Decedent's statement or actions. The court then heard testimony from Jo Anne along with the title agent (who issued the title commitment and drafted the deed) and the real estate agent (who drafted the offer to purchase and ordered the title commitment and deed).

¶7 At the conclusion of the hearing, the circuit court found that the language on the deed was selected in error by the real estate agent, who had limited experience and training. The court also found that neither the Decedent nor Jo Anne had much input on title and that there was a fair amount of confusion due, in part, to a lack of attorney review or participation. The court identified certain drafting errors in the offer to purchase, further evidencing the real estate agent's inexperience. As a result, the court placed little significance on any of the transaction documents. Ultimately, the court found the lake home was survivorship marital property based on Jo Anne's understanding that the survivor would retain the lake home upon the other spouse's passing. This appeal follows.

¶8 On appeal, the Jacobson children first contend that the circuit court erred in finding the lake home to be survivorship marital property. They submit that the lake home should be classified as marital property because the deed listing the property was clear, and evidence opposing the same consisted only of Jo Anne's misunderstanding of the effect of such titling.

¹ All references to the Wisconsin Statutes are to the 2013-14 version.

¶9 A court in equity can reform written instruments that do not express the true intentions of the parties. See *Chandelle Enters., LLC v. XLNT Dairy Farm, Inc.*, 2005 WI App 110, ¶18, 282 Wis.2d 806, 699 N.W.2d 241. Reformation may be established by evidence of circumstances and nature of the transaction and conduct of the parties. *Kadow v. Aluminum Specialty Co.*, 253 Wis. 76, 78-79, 33 N.W.2d 236 (1948). We review the decision to grant equitable relief for an erroneous exercise of discretion. *Pietrowski v. Dufrane*, 2001 WI App 175, ¶5, 247 Wis. 2d 232, 634 N.W.2d 109.

¶10 Here, the circuit court employed its equitable powers to recognize Jo Anne's right of survivorship in the lake home property. Contrary to Jacobson's assertion, the court's decision was based on more than simply Jo Anne's misunderstanding of the effect of titling. As noted, the court found that the language on the deed was selected in error by the real estate agent, who had limited experience and training. The court also found that neither the Decedent nor Jo Anne had much input on title and that there was a fair amount of confusion due, in part, to a lack of attorney review or participation. These findings are supported by the record. Given the ambiguities in the transaction documents and the actual understandings of the parties as reflected in the testimony, there were ample grounds for the court to exercise its discretion and grant the equitable relief.

¶11 The Jacobson children next contend that the circuit court erred in considering extrinsic evidence with respect to the circumstances surrounding the purchase of the lake home. They submit that such consideration was improper based on the clear language of the deed.

¶12 Appellate courts review a circuit court's decision to admit or exclude evidence for an erroneous exercise of discretion. *Martindale v. Ripp*, 2001 WI

113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. We will uphold the circuit court’s ruling if there was a rational basis for its decision. *Id.*, ¶29.

¶13 We conclude that there was a rational basis to admit the extrinsic evidence at issue. To begin, the extrinsic evidence was necessary for evaluating Jacobson’s claim of reformation. Moreover, the circuit court could reasonably conclude that the deed was ambiguous as to the intent to extinguish the right of survivorship. It was therefore justified in examining extrinsic evidence to determine the true intent of the parties. *See Chandelle*, 282 Wis. 2d 806, ¶12.

¶14 Finally, the Jacobson children contend that Jo Anne lacked competency to testify regarding her purchase of the lake home due to the applicability of WIS. STAT. § 885.16, also known as the dead man’s statute. The interpretation of a statute and its application to a set of facts is a question of law that we review de novo. *Homeward Bound Servs., Inc. v. Office of the Ins. Comm’r*, 2006 WI App 208, ¶15, 296 Wis. 2d 481, 724 N.W.2d 380.

¶15 The dead man’s statute is an exception to the general rule of competency “in respect to any transaction or communication by the party or person personally with a deceased or insane person in any civil action or proceeding, in which the opposite party derives his or her title or sustains his or her liability to the cause of action from, through or under such deceased or insane person....” WIS. STAT. § 885.16. Although the statute’s wording is cumbersome, its “core meaning is that it disqualifies a witness to a transaction or communication with a decedent from testifying about that transaction or communication in his or her favor, or in the favor of any party to the case claiming under the witness.” *Bell v. Neugart*, 2002 WI App 180, ¶17, 256 Wis. 2d 969, 650 N.W.2d 52.

¶16 In this case, Jo Anne was not seeking to testify about a transaction or communication with the Decedent. Rather, she was seeking to testify about a transaction or communication with the seller of the lake home. Her review and understanding of the closing documents in the transaction did not evoke the dead man's statute, and the circuit court properly allowed her to testify to her conduct, perspective, and thoughts.

¶17 For these reasons, we affirm the order of the circuit court.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

